Sunrise West Sdn Bhd & Ors v Pravin Mahtaney Ramchand & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-2367 OF 2010
HAMID SULTAN J
27 MAY 2011

Companies and Corporations — Directors — Breach of fiduciary duties — Undertaking not to deal with items dealt by first plaintiff — Breach of undertaking — Whether established — Whether first plaintiff produced valid resolution to initiate action

Companies and Corporations — Directors — Operation of first plaintiff — Foreign directors — No resident directors — Whether serious violations of the Companies Act 1965

Companies and Corporations — Directors — Remuneration — First defendant's role in first plaintiff — Whether mere salesman holding position of managing director — Whether first defendant's claim for remuneration challenged

The plaintiffs' claim against the defendants herein was for loss and damages arising from the breach of the fiduciary duties. Meanwhile, the first defendant counterclaimed against the first plaintiff for loss of income. In this case, the first defendant, a Singapore national, was a salesman in textile business who did sales in Malaysia for Vision International. The fourth plaintiff was made a director (not shareholder) in Vision International and his job assignment was to do sales relating to textile, a business which Vision International was not doing before. Subsequently, a company was established in Malaysia to do the sales and hence, the formation of the first plaintiff. The first defendant's role towards the first plaintiff was that of salesman only. The financial management and keeping of accounts was directly and/or indirectly controlled by the fourth plaintiff who is not a resident of Malaysia but of Singapore and through a staff of Vision International. By a letter of appointment dated 24 May 2008, the first defendant was appointed as managing director with an agreed remuneration of RM8,250 per month but this sum was never paid and the first defendant obtained the consent of the fourth plaintiff to start a new business in textile in Malaysia for himself to boost his income on the undertaking that he will not deal with items that the first plaintiff was currently dealing with. The fourth plaintiff had consented to it and now the writ action was filed in contrary to the consent and corporate jurisprudence was asserted to find liability against the defendants.

Held, dismissing the plaintiffs' claim with costs and allowing the first defendant's counterclaim:

(1) The controlling mind of the first plaintiff was the fourth plaintiff, and this was extremely clear from the evidence, though the fourth plaintiff was attempting to deny an obvious fact and in consequence, inter alia, this court takes the view that he was not a witness of truth. The fourth plaintiff's evidence was not credible, contradicted with contemporaneous documents and conduct of parties and also the fourth plaintiff was operating the first plaintiff in breach of the Companies Act 1965 namely, that there were no resident directors for the company and all the present directors were foreigners. Further, the plaintiffs had not produced a valid resolution to initiate this action in particular against the first defendant for breach of the purported fiduciary duty etc (see paras 11–12).

(2) There was no evidence adduced on the part of the plaintiff to show in law and fact that the first defendant had breached the so called fiduciary duty or any duty recognised in law which the plaintiffs complained of, to provide the relief claimed for and that too on behalf of all the parties. The first defendant's role was in essence a salesman and nothing more, and all his action was closely monitored by the fourth plaintiff, directly and/or indirectly (see para 19(a)).

(3) The first defendant's claim for remuneration must be allowed as there was sufficient evidence to show that he was entitled to claim the said sum and the sum as agreed had not been paid notwithstanding he was a salesman of the first plaintiff. In addition, the entire witness statements of the plaintiffs in particular the fourth plaintiff did not challenge the first defendant's claim for remuneration. This, in the courts opinion, will be fatal in evidential terms and such omission may stand as an admission in favour of the first defendant (see para 19(d)).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan-defendan di sini adalah untuk kerosakan dan kerugian yang berbangkit daripada kewajipan fidusiari. Sementara itu, defendan pertama menuntut balas terhadap plaintif pertama bagi kehilangan pendapatan. Di dalam kes ini, defendan pertama, seorang warganegara Singapura, adalah jurujual dalam perniagaan tekstil yang membuat perniagaan di Malaysia bagi Vision International. Plaintif keempat dijadikan pengarah (bukan pemegang saham) dalam Vision International dan tugasan kerjanya adalah untuk membuat jualan berkaitan tekstil, satu perniagaan yang Vision International tidak berbuat sebelum ini. Kemudian, sebuah syarikat ditubuhkan di Malaysia untuk membuat jualan dan dengan itu, pembentukan plaintif pertama. Peranan defendan pertama kepada plaintif pertama adalah sebagai jurujual sahaja. Pengurusan kewangan dan penyimpanan akaun adalah

secara langsung dan/atau tidak langsung dikawal oleh plaintif keempat yang bukan residen Malaysia tetapi Singapura dan melalui pekerja Vision International. Melalui surat pelantikan bertarikh 24 Mei 2008, defendan pertama dilantik sebagai pengarah urusan dengan gaji yang dipersetujui sebanyak RM8,250 sebulan tetapi jumlah ini tidak pernah dibayar dan defendan pertama memperoleh persetujuan plaintif keempat untuk memulakan perniagaan baru dalam tekstil di Malaysia untuk dirinya sendiri untuk meningkatkan pendapatannya dalam janji bahawa dia tidak akan berurusan dengan item yang plaintif pertama sedang berurusan sekarang. Plaintif keempat telah menyetujuinya dan kini tindakan writ difailkan bertentangan dengan persetujuan dan jurisprudens korporat dinyatakan untuk mendapatkan liabiliti terhadap defendan-defendan.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan pertama:

(1) Pihak yang mengawal plaintif pertama adalah plaintif keempat, dan ini adalah amat jelas daripada keterangan, walaupun plaintif keempat mencuba untuk menafikan fakta yang jelas dan menyebabkan, antara lain, mahkamah ini berpendapat bahawa dia bukan saksi yang benar. Keterangan plaintif keempat tidak boleh dipercayai, bertentangan dengan dokumen semasa dan tindakan pihak-pihak dan juga plaintif keempat menjalankan plaintif pertama dalam kemungkiran Akta Syarikat 1965 iaitu tidak ada pengarah tetap syarikat dan kesemua pengarah yang ada adalah orang asing. Selanjutnya, plaintif-plaintif tidak mengemukakan resolusi yang sah untuk memulakan tindakan ini khususnya terhadap defendan pertama bagi kemungkiran kewajipan fidusiari yang dinyatakan (lihat perenggan 11–12).

(2) Tidak ada keterangan yang dikemukakan pada pihak plaintif untuk menunjukkan dari segi undang-undang dan fakta bahawa defendan pertama telah memungkiri kewajipan fidusiari atau apa-apa kewajipan yang dikenali dari segi undang-undang yang plaintif adukan, untuk memberikan relief yang dituntut dan ia juga bagi pihak kesemua pihak-pihak. Peranan defendan pertama adalah pada asasnya seorang jurujual dan bukan lebih daripada itu, dan kesemua tindakannya diperhatikan secara teliti oleh plaintif keempat, secara langsung dan/atau tidak langsung (lihat perenggan 19(a)).

(3) Tuntutan defendan pertama untuk gaji mesti dibenarkan kerana terdapat keterangan yang mencukupi untuk menunjukkan bahawa dia berhak untuk menuntut jumlah tersebut dan jumlah tersebut seperti yang dipersetujui tidak dibayar walaupun dia adalah jurujual plaintif pertama. Tambahan, keseluruhan kenyataan saksi plaintif-plaintif khususnya plaintif keempat tidak mencabar tuntutan defendan pertama untuk gaji. Ini, pada pendapat mahkamah, adalah fatal dalam terma keterangan dan

peninggalan sedemikian boleh menjadi pengakuan yang memihak kepada defendan pertama (lihat perenggan 19(d)).]

Notes

For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 195–208.

For cases on directors in general, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 150–388.

For cases on remuneration, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 378–380.

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623, HC (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209; [1984] 2 CLJ 169; [1985] CLJ (Rep) 37, HC (refd)

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411; [2003] 4 CLJ 785, CA (refd)

Basi Controls (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 1 CLJ 184 (refd)

Blue Sea Pools Swimming Centre (Klang) Sdn Bhd [2003] 1 LNS 121 (refd)

Caparo Industries plc v Dickman and others [1990] 1 All ER 568, HL (refd)

Citi Leather Sdn Bhd (in liquidation) v Hoe Joo Leong @ Khoo Hock Tat & 3 Ors Civil Suit No D5–22–1398 of 2004 (refd)

Fong Poh Yoke v The Central Construction Company (Malaysia) Sdn Bhd [1998] 4 CLJ Supp 112 (refd)

Foo Tye Electrical Engineering Sdn Bhd v Sesco [2009] 1 LNS 506 (refd)

Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 3 MLJ 433; [1993] 1 LNS 96, HC

Kulandi Muthu v Subramaniam Velliappan [1983] CLJ 603 (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

Lee Yuke Fong v Ng Choon Hua Kuala Lumpur High Court (Family Court) Divorce Petition No S8–33–1128 of 2002 (refd)

Letrik Bandar Hup Heng Sdn Bhd v v Wong Sai Hong [2002] 5 MLJ 247; [2002] 5 CLJ 170, HC (refd)

Magnifine Sdn Bhd v Yap Mun Him [2005] 6 CLJ 413 (refd)

Maica Corporation Sdn Bhd v Bina Satu Sdn Bhd & Anor [2008] 9 CLJ 243 (refd)

Mohamed bin Kasdi v PP [1969] 1 MLJ 135 (refd)

New Zealand Netherlands Society 'Oranje' Inc v Kuys [1973] 1 WLR 1126 (refd)

Ng Pak Cheong v Global Insurance Co Sdn Bhd [1995] 1 MLJ 64, HC (refd)

Percival v Wright [1902] 2 Ch 421 (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)
Quality Concrete Holdings Bhd v Classic Gypsum Manufacturing Sdn Bhd & Ors [2008] 7 MLJ 677, HC (refd)
Sanyan Lumber Sdn Bhd v Sanyan Wood Industries Sdn Bhd [2008] 8 MLJ 336; [2008] 1 LNS 329, HC (refd)
Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors [1991] 1 MLJ 211, HC (refd)
See Hua Realty Bhd v See Hua News Holding Sdn Bhd & Ors [2007] 7 MLJ 525 (refd)
Tai Kim San & Anor v Lim Cher Kia [2001] 1 SLR 607, HC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265; [1997] 2 CLJ 607, CA (refd)
Teoh Peng Phe v Wan & Co [2001] 5 MLJ 149; [2001] 5 CLJ 222, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Union Insurance Malaysia Sdn Bhd v Chan You Young [2003] 3 MLJ 484; [2003] 7 CLJ 50, HC (refd)
United Investment and Finance Ltd v Tee Chin Yong & Ors [1967] 1 MLJ 31 (refd)
Wong Chun Wah v Kok Kam Chee (p) [2008] 3 MLJ 176; [2008] 3 CLJ 510, CA (refd)
Yap Ee Kong & Anor v Public Prosecutor [1981] 1 MLJ 144, FC (refd)

Legislation referred to

Companies Act 1965
Evidence Act 1950 s 114

Rajinder Singh (Rajinder Singh) for the plaintiffs.
Amer Hamzah Arshad (Jamie Wong with him) (Ranjit Singh & Yeoh) for the defendants.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiffs' claim against the defendants for loss and damages in essence for breach of fiduciary duty and the first defendant's counterclaim for loss of income etc.

[2] The prayers in the statement of claim read as follows:

31. As a result of the matter set out above, the 1st plaintiff has suffered loss and damage, as particularised herein.

32. The 1st defendant is liable to account to the 1st plaintiff for his breaches of fiduciary duty and trust as pleaded above.

33. The 2nd defendant is liable to account to the plaintiff as a constructive trustee on the ground of knowing receipt (sic).

34. Further and/or alternatively, the 1st plaintiff is entitled to trace an amount equivalent to its losses into any traceable product and claims a beneficial interest in or alternatively an equitable lien over, any traceable product which the 2 defendant holds on trust for the 1st plaintiff (sic).

AND the 1st plaintiff claims:

(1) against the 1st defendant:

(a) A declaration that the 1st defendant has breached his duties to the 1st plaintiff;

(b) A declaration that the 1st defendant is liable to account to the 1st plaintiff for an amount equivalent to its losses as a constructive trustee on the ground of his breach of fiduciary duty and/or breach of trust;

(c) An order that the 1st defendant pays to the 1st plaintiff damages to be assessed;

(d) An order that the 1st defendant do indemnify the 2nd and 3rd plaintiffs against all and any losses incurred as a result of their guarantorship in favour of the 1st plaintiff towards the financial facilities obtained from RHB Bank and Citibank Berhad;

(e) An order that the 1st defendant is liable to pay the 4th defendant the sum ofRM558,332.02; and

(f) Exemplary damages.

(2) against the 2nd defendant:

(a) A declaration that the 2nd defendant is liable to account to the 1st plaintiff for sum equivalent to the 1st plaintiff's losses as a constructive trustee on the ground of its dishonest assistance in each of the Is' defendant's breaches of fiduciary duty and/or breaches of trust on the grounds of knowing receipt (sic);

(3) interest;

(4) damages to be assessed;

(5) costs; and

(6) such further or other relief as deemed fit by this Honorable Court.

[3] In this case I am disappointed to note that the papers were not properly presented despite clear case management directions and notes. For example, there was no bundle of pleadings filed, no agreed facts, no appropriate resolutions to commence proceedings etc; I must say here when basic facts are not agreed upon before commencement of trial or the dispute in relation to the agreed facts are not brought to the attention of the judge to enable the court to give appropriate directions, then the assessment of the facts and evidence may

become difficult and challenging at trial as this case will show. In short I must say when the plaintiff does not meticulously get appropriate directions as well as put in the relevant documents in an orderly fashion to sustain his claim, at the case management stage itself then he may face various legal and technical challenges which may defeat the plaintiffs' claim in limine. In addition framing issues to be tried without agreed facts may at times be fatal. It is incumbent in civil litigation and I will say duty of counsel to present to the court in clear and unequivocal manner the agreed facts and issues to be tired at the case management stage for proper administration of justice. This procedural courtesy is trite and settled practice in our related jurisdiction within the commonwealth. It must be asserted that case management protocol must not be arbitrarily attended to without appropriate focus to facts, issues and documents etc.

STATEMENT OF AGREED ISSUES TO BE TRIED

[4] The statement of issues to be tried reads as follows:

(i) Whether the plaintiff's cause of action as pleaded is maintainable against the 1st and/or 2nd defendant.

(ii) Whether the plaintiffs' claim herein is materially affected to the extent that the plaintiffs would not have a cause of action as pleaded if the 1st plaintiff company was in reality a partnership between the 4th plaintiff and the 1st defendant.

(iii) Whether the plaintiffs collectively agreed to stand as surety and/or to provide security for the RHB Banking Facilities and the Citibank Facility on the basis of the trust reposed within the 1st defendant as well as representations made by the 1st defendant to the extent that both the RHB Banking Facility and the Citibank Facility would be repaid through profits generated by the 1st plaintiff from the 1st plaintiff's business which would be enhanced through the banking facilities.

(iv) Whether the 1st defendant was entitled to incorporate the 2nd defendant company which similarly trades in the business of textile.

(v) Whether the 1st and 2nd defendants acted in concert and thereby caused loss to the 1st plaintiff.

(vi) Whether the 1st plaintiff was aware and further whether the 1st plaintiff agreed to the incorporation of the 2nd defendant by the 1st plaintiff.

(vii) Whether the 1st defendant is in breach of his fiduciary duties as pleaded and particularised vide paragraph 7 of the statement of claim.

(viii) Whether the plaintiffs or any one of them has thereby suffered a loss and is therefore entitled to claim damages and relief as prayed for.

(ix) Whether the 3rd party 'Time Deposit' in the sum of RM500,000.00 in favour of Citibank Berhad may rightfully be claimed by the 4th plaintiff against the Ist defendant,

(x) Whether the non repayment of the 1st plaintiff's bank facilities was caused by the 4th plaintiff.

(xi) Whether the 4th plaintiff was in breach of his fiduciary duties/breach of trust as pleaded in paragraphs 18 and 19 of the defence and counterclaim dated 15.12.2010.

(xii) Whether the 1st defendant was unlawfully removed as a director of the 1st plaintiff.

(xiii) Whether the 4th plaintiff had unlawfully transferred and/or withdrawn monies from the 1st plaintiff's account for his own benefit and/or personal use.

(xiv) Whether the 1st plaintiff failed to pay the 1st defendant his salary as promised since May 2008.

(xv) Whether the 1st defendant is thereby entitled to loss of income from May 2008 until May 2010 in the sum of RM192,000.00.

(xvi) Whether the 2nd, 3rd and 4th plaintiffs had conspired and/acted in concert to injure the 1st defendant's goodwill and reputation as a director of the 1st plaintiff.

OBSCURE AND INSUFFICIENT PLEADINGS

[5] It must be noted that the plaintiffs' statement of claim makes allegation of general nature without condescending the particulars of any specific issues relating to the remedy; more so when the evidence was led to show that:

(a) the first defendant was merely a salesman with an elevated title as managing director when the actual management and control of all financial affairs of the company was directly and/or indirectly controlled by the fourth plaintiff ('PW3') and the accounts managed through the staff of the fourth plaintiff's company in Singapore known as Vision International Private Ltd (Vision International) in which the fourth plaintiff and the father are shareholders and directors;

(b) the second defendant was formed by the first defendant with the consent and approval of the fourth plaintiff (although disputed by the plaintiffs) and at no material times after the formation or before the formation the first plaintiff and/or the fourth plaintiff has raised any objection in the nature raised in the statement of claim; and

(c) all the directors and/or shareholders in the first plaintiff except the first defendant, who is a minority shareholder, are directly and/or indirectly the nominees of the fourth plaintiff, and have no interest in the first, second and third plaintiffs (who have resigned as directors) were people introduced by the company secretary, Mr Ramanathan ('PW2'), who said in cross-examination that they are to be nominees directors and/or shareholders based on a trust deed which PW2 said was in existence but was never produced by the plaintiffs. It is quite possible, if the plaintiffs

had produced the trust deed it might have disclosed some evidence which may not be in the plaintiffs' favour. In addition it must be noted that a critical appraisal of the witnesses' statements will show that all the plaintiffs' witnesses are directly and/or indirectly obligated to the fourth plaintiff.

[6] It is difficult to see how a claim in essence based on purported breach of fiduciary duty can succeed when the first defendant has nothing to do with the financial management and/or control of the company and the second defendant was formed by the first defendant with the consent and approval of the fourth plaintiff. It must also be noted that the real litigant in this action is the fourth plaintiff and the first defendant, who are foreign nationals and ultimately the award of costs in this action must take this fact into consideration. In addition, the relief claimed in the pleaded form by all the plaintiffs against the defendants cannot be sustained in law. It is trite when the pleadings are obscure and/or the relief claimed is ambiguous, and/or the complaints are all lumped together over which the court is unable to make any findings at all to provide the relief then the action will stand as an exercise in prolixity. The court's role in such case of obscurity is not one of 'filter of debris'. I have dealt with this area of jurisprudence in a number of cases. In *See Hua Realty Bhd v See Hua News Holding Sdn Bhd & Ors* [2007] 7 MLJ 525, I have made the following observations:

> The petition in this case is drafted in a manner that runs to 72 pages. This petition is, as if an entire set of complaints, whether or not they fall within the purview of s 181, have all been hurled into the court with the duty foisted on the court to pick and choose to allow the petition. The court is not a filter of debris (see *Watson v Rodell* 3 Ch D 380). Where a petition is nothing more than a jangled mass of complaints all lumped together over which the court is unable to make any finding at all, of either oppression or undue prejudice, because the petition is nothing more than an exercise in prolixity, then it must fall. It has long been held that where the cause papers are so framed as be too prolix, where they disclose immaterial facts, and set out at great length documents which could not be material to the issues at hand, such as to as embarrass the opposite party (see *Cashin v Cradock* 3 Ch D 376), such pleadings are liable to be, and have, on occasions, been struck out (see *Davy v Garret* [1877] 7 Ch D 473).

The same observation will equally apply here with the necessary modifications as to the facts of this case.

BRIEF FACTS

[7] The first defendant was a Singapore national at all material times and was a salesman in textile business. The fourth plaintiff met him and subsequently was made a director (not shareholder) in Vision International and his job assignment was to do sales relating to textile, a business which Vision

International was not doing before. The first defendant did sales in Malaysia for Vision International and later it was thought prudent to establish a company in Malaysia to do the sales and hence the formation of the first plaintiff. The company secretary, PW2, was instrumental in the formation of the company and he had introduced two of his staff to be resident directors and/or shareholders and/or nominees in respect of the formation of the first plaintiff. PW2 said there was a trust deed relating to this but was never produced. The first defendant's role in the first plaintiff was that of salesman only and the financial management and keeping of accounts was directly and/or indirectly controlled by the fourth plaintiff who is not a resident of Malaysia but of Singapore and through a staff of Vision International.

[8] By a letter of appointment dated 24 May 2008 (encl 16 — p 279) the first defendant was appointed as managing director with an agreed remuneration of RM8,250 per month but this sum was never paid and the first defendant obtained the consent of the fourth plaintiff to start a new business in textile in Malaysia for himself to boost his income on the undertaking that he will not deal with items that the first plaintiff is currently dealing with. The fourth plaintiff had consented to it and now the writ action is filed in contrary to the consent and, corporate jurisprudence is asserted to find liability against the defendants.

PRELIMINARIES

[9] The four witnesses gave evidence for the plaintiffs and the first defendant gave evidence for the defendants.

[10] I must say here that the first defendant's evidence was consistent with all contemporaneous documents in support. His role in the first plaintiff was merely a salesman though he had held the position of the managing director.

[11] The controlling mind of the first plaintiff was the fourth plaintiff, and this was extremely clear from the evidence, though the fourth plaintiff was attempting to deny an obvious fact and in consequence, inter alia, I take the view that he is not a witness of truth. The fourth plaintiff's evidence was not credible, contradicted with contemporaneous documents and conduct of parties and also the fourth plaintiff was operating the first plaintiff in breach of the Companies Act 1965 which has been highlighted by learned counsel in evidence as well as submission which has merits and I find on the facts of the case it will serve no useful purpose to repeat the same.

[12] It must also be noted that in the instant case learned counsel for the defendants complain that there are no resident directors for the company and all the present directors are foreigners and in consequence there are serious

violations of the Companies Act 1965 and learned counsel also complains that the plaintiffs have not produced valid resolution to initiate this action in particular against the first defendant for breach of the purported fiduciary duty etc. In this issue I must say the Indian position is stated by the learned authors of A Ramaiya, *Guide to the Companies Act*, (12th Ed), 1992 at p 1336 as follows:

> Unless the power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf o the company. Needless to say that such a power can be conferred by the Board of directors so only by passing a resolution in that regard. *Nibro Ltd. v National Insurance Co. Ltd.,* (1991) 70 Com Cases 388, 401: (1990) 3 CompU 15 (Del).

[13] In *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209; [1984] 2 CLJ 169 the court on the facts of the case had stated that in the absence of express limitations to the contrary, the managing director of a company has the implied authority to commence legal proceedings in the name of the company. This proposition was not strictly followed in *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211 where the court held that a managing director had no implied or actual authority to do so. The Singapore's position is reflected in the case of *United Investment and Finance Bhd v Tee Chin Yong & Ors* [1967] 1 MLJ 31 where Chua J took the view that a managing director did not have the power to authorise proceedings unless that power had been vested in him by the board.

[14] Some suggestions and the difficulty in this area of jurisprudence has been highlighted by the learned author Walter Woon, *Company Law*, (2nd Ed) at p 319 and part of it reads as follows:

> It is suggested that VC George J's view in the Avel Consultants case must be right in principle. It would be ludicrous if the law required the board or general meeting of a company to meet and specifically authorise the managing director to commence litigation to recover, say, a S$10,000 debt or to defend a suit brought against the company. Looking at the issue from another point of view, would it be reasonable for a solicitor to demand a board or general meeting resolution before accepting instructions from the company's managing director in such a suit? Or is it more realistic to say that such matters are within the usual authority of a managing director? To hold that a resolution is necessary would mean, firstly, that the action could be struck out as unauthorised and, secondly, that the solicitor would be liable for the other party's costs, having commenced a suit without proper authority. This, it is suggested, is an appalling conclusion. It is suggested that the better view is that the power to institute and defend action is a sub-set of the power of management, and it the managing director has been delegated the power to manage the company he must necessarily have the power to authorise legal proceedings in the company's name.

[15] On my part I had the opportunity to consider this area of jurisprudence in the case of *Sanyan Lumber Sdn Bhd v Sanyan Wood Industries Sdn Bhd* [2008] 8 MLJ 336; [2008] 1 LNS 329. On the facts of the case I made the following observation:

> I have heard the evidence, the documents and submission of the parties in detail. I take the view that the plaintiffs' action must be dismissed. My reasons are as follows:
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> (i) It is my finding that PW1 has no authority to commence this action. He is not a shareholder who has more than 50% shares in the plaintiff. In consequence, he ought to have obtained the approval of the board of directors. In this case, there is no resolution of the board of directors or resolution of the general meeting of the plaintiff company to commence the proceedings. It will be different if the majority of the shareholders would have approved the proceedings if it has been initiated. There are number of authorities to my proposition and some of them are as follows:
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> (a) *Halsbury's Laws of England*, (4th Ed), 1996 Reissue, Vol (7(2)), states at para 1170 'Control of company's litigation. As regards litigation by an incorporated company, as rule the directors are the persons who have authority to act for the company, but in the absence of any contract to the contrary in the articles of association, the majority of the members are entitled to decide, even to the extent of overruling the directors, whether action in the company's name should be begun or allowed to proceed. The secretary of company cannot institute proceedings in its name in the absence of express authority to do so; but proceedings begun without authority may subsequently be ratified'.
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> (b) *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211; [1991] 3 CLJ 706 (Rep); [1991] 1 CLJ 373. Although it was overturned on appeal on a technical point relating to affidavit, the judgment of Haidar J (as he then was) on the authority to sue, remains good law and has been applied in cases such as *Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & Ors* [2001] 1 MLJ 451.
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> (c) In *Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & Ors* [2001] 1 MLJ 451, Clement Skinner J opined:
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> Where a challenge to authority in commencing proceedings has been made, the burden of proving that the suit has been instituted with the authority of the company rests on the plaintiff (see p 46ID). The plaintiff failed to adduce evidence to show how and when the authorisation was given by the board of directors of the plaintiff and how and when that full approval by the plaintiff was given. Hence, those were merely bare assertions by the plaintiff and the plaintiff had failed to discharge the burden of proving that Mr Wong had the authority to commence the suit.
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> (ii) In this case, the plaintiffs submit that PW1 has the actual and ostensible authority. I find on the facts of this case and after hearing the evidence that this statement is mischievous as it was clear from the evidence, that PW1 did not obtain consent from the other shareholder and even if he had attempted to

obtain the consent he would not have obtained them because of the special working arrangement between all persons involved in the joint venture agreement including PW1. It was also the evidence of PW1 that he was forced to resign as the managing director of the defendants in the year 2003. After hearing the evidence on the whole and failure of PW1 to disclose the truth, I take the view that PW1 has initiated this action to demonstrate his frustration. The plaintiffs' submission of agent of necessity has no basis. In this case, the submission of the defendants' counsel has merits and that part of the submission is reproduced:

> Ting Chek Sii seeks to rely on the principle of agent of necessity in the case of *Avel Consultants Sdn Bhd & Anor v Mohd Zain Yusof & Ors* [1984] 1 CLJ 482. However, it is submitted that the principle of agent of necessity does not apply in the present case and *Avel Consultants* is distinguishable for the reasons below. No emergency or urgency giving rise to agency of necessity — Regarding agency of necessity, it is stated in *Janab's Guide to Law and Practice and Legal Remedies*, Vol II, at p 247:
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> > An agent by necessity is one recognised by law in certain cases. For example, where a person is faced with an emergency in which the property or interest of another are in imminent danger and it becomes necessary in order to preserve the property or interests, act before the instructions of the owner can be obtained. In such cases, the law assumes consent of the owner to the creation of the relationship of principle and agent.

Even in *Avel Consultants*, VC George J (as he then was) said:

> It seems to me that the doctrine of agency of necessity is not without application in this case. In *Halsbury's Laws of England*, (3rd Ed), Vol 1 at p 157 para 373 deals with the application of the doctrine, portions of which read as follows:
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> > Agency of necessity arises wherever a duty is imposed upon a person to act on behalf of another apart from contract, and in circumstances of emergency, in order to prevent irreparable injury. It may also arise where a person carries out the legal or moral duties of in the absence or default of that other, or acts in his interest to preserve his property from destruction.
> >
> > The conditions which entitle an agent to exceed his authority under the doctrine of necessity are (1) that he could not communicate his principal (2) that the course he took was necessary in the sense that it was in the circumstances the only reasonable and prudent course to take and (3) that he acted bona Me in the interest of the parties concerned. At the same time, though a strong case is required, it is not essential that any other course shall be impossibility.

No support of the majority — Even based on a doctrine of necessity, there is still a requirement of being able to show the support of the majority. It may be noted that, in Avel's case, the managing director, and another shareholder, held majority shares in the company. The learned judge, VC George J, said that there was no necessity to hold a general meeting as obviously a resolution to authorise the action would be passed by the general meeting.

A And since the outcome of any motion at such a meeting to cause the writ to issue was obvious and foregone conclusion in that Johari and Abdul Halim owned or controlled more than 50% of the shares, having such a meeting was not necessary.

Further, the case of *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co* [1909] 1 Ch 267 referred to by VC George J, clearly shows the application of the majority rule principle. His Lordship said:

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> In *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] Ch 267 in a situation not unlike the situation obtaining in the instant Neville J refused a motion to direct the removal of the writ which had been caused to issue without a board or general meeting decision. In that
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> C case the managing director who had caused the writ to issue controlled the majority of the shares of the company. At the top of p 272 Neville J said: Mr Marshall has commenced an action in the name of the company for the purpose of restraining an alleged infringement on part of the owners of the new patent, and the other directors come to the court and
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> D ask to have the writ in that action taken off file on the ground that the action was commenced without the authority of the company. It is admitted that the calling of a of shareholders to ascertain the wishes of the company would be useless because the position of the voting power is perfectly well understood. It is divided between the persons concerned, and undoubtedly the managing director, who has commenced this
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> E action, would have the majority of votes at a general meeting, and, therefore, if it is right that effect should be given to the wishes of the majority of the company in the present case, it is admitted that no object is to be gained by calling a meeting, because the result of that meeting is a foregone conclusion. Under those circumstances ought the court to
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> F direct the removal of the writ?

The judge answered that question at the bottom of p 273:

> … it is obvious, I think, that I ought not to interfere with the progress of the present action, because it is brought with the approval of the majority of the
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> G shareholders in the company, and, upon the decisions which I have referred to, they are the persons are entitled to say, aye or no, whether the litigation shall proceed.

In the present case, there is no evidence of any emergency or any urgency that would have necessitated the commencement of the action without the proper
H authorisation from the board or the general meeting. It may be noted that for 13 years (after the joint venture agreement) there was no claim or allegation of 'rentals' being due. Furthermore, Ting Check Sii does not hold majority shares in the plaintiff company. He cannot claim command or support of the majority votes or to be agent of those votes. The other director and shareholder (holding 50%), DW1,
I was not consulted. DW1 has expressly disagreed with the institution of the present action. There was no board meeting or general meeting to authorise the present action. Moreover, since the present action was commenced almost two years ago, there has been no attempt at all to obtain ratification. Accordingly based on *Malaysia Land Investment Co v Sathask Realty Sdn Bhd* and the case of *Mitchell & Hobbs* the present action should be struck out.

(iii) In this case, I have heard the evidence of the two Japanese directors. I have no hesitation to hold that they are witnesses of truth and they had not minced the evidence and the truth as attempted by PW1. In consequence, I accept the defendants' version and rule that the defendants' defence must succeed and there is nothing prohibiting in law for the plaintiffs to permit the defendants to operate its business in the said premise without payment of rental as per the terms agreed.

For reasons stated above, I dismiss the plaintiffs' claim. Further, as this action was not properly commenced and the conduct of PW1 has caused much embarrassment and hardship to the defendants, it is only proper that I should order PW1 to personally bear the costs of this action and indemnify the two Japanese directors of the defendant for all expenses, inclusive of travelling expenses incurred to come to Malaysia, to give evidence for this case on a full indemnity basis …

[16] In view of the nebulous position of the law in respect of the need for authorisation to initiate proceedings it will be advisable for plaintiffs who are corporate litigant to ensure the required resolutions are produced at the case management stage itself to avoid technical objections, at the end of the trial.

[17] On the facts of the instant case and after having gone through the evidence there is little doubt that there are serious violations of the Companies Act 1965 and the fact that the first plaintiff had not commenced the proceedings regularly compounds the problem to warrant to say that lack of proper consent in the instant case is fatal. In any event I have also considered the merits of the case before arriving at a decision.

[18] The parties have relied on the following cases: *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; *Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149; [2001] 5 CLJ 222; *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64; *Lee Yuke Fong v Ng Choon Hua Kuala Lumpur High Court (Family Court)* Divorce Petition No S8–33–1128 of 2002; *Maica Corporation Sdn Bhd v Bina Satu Sdn Bhd & Anor* [2008] 9 CLJ 243; *Citi Leather Sdn Bhd (in liquidation) v Hoe Joo Leong @ Khoo Hock Tat & 3 Ors* Civil Suit No D5–22–1398 of 2004; *Kulandi Muthu v Subramaniam Velliappan* [1983] CLJ 603; *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209; [1985] CLJ (Rep) 37; *Abdul Rahim bin Aki @ Mohd Haki v Krubong Industrial Park (Melaka)Sdn Bhd & 5 Ors*; *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265; [1997] 2 CLJ 607; *Magnifine Sdn Bhd v Yap Mun Him* [2005] 6 CLJ 413; *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; *Blue Sea Pools Swimming Centre (Klang) Sdn Bhd* [2003] 1 LNS 121; *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 4 CLJ 785; *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433; [1993] 1 LNS 96; *Letrik Bandar Hup Heng Sdn Bhd v v Wong Sai Hong* [2002]

5 MLJ 247; [2002] 5 CLJ 170; *Quality Concrete Holdings Bhd v Classic Gypsum Manufacturing Sdn Bhd & Ors* [2008] 7 MLJ 677; *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623; *Fong Poh Yoke v The Central Construction Company (Malaysia) Sdn Bhd* [1998] 4 CLJ Supp 112; *Basi Controls (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 1 CLJ 184; *United Investment and Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31; *Caparo Industries plc v Dickman and others* [1990] 1 All ER 568; *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135; *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631; *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144; *Snell's Equity*, (31st Ed); *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126; *Foo Tye Electrical Engineering Sdn Bhd v Sesco* [2009] 1 LNS 506; *Union Insurance Malaysia Sdn Bhd v Chan You Young* [2003] 3 MLJ 484; [2003] 7 CLJ 50; *Wong Chun Wah v Kok Kam Chee (p)* [2008] 3 MLJ 176; [2008] 3 CLJ 510.

[19] I have heard the evidence and submission of the parties in detail. I take the view that the plaintiffs' claim must be dismissed and the first defendant's counterclaim must be allowed. My reasons, inter alia, are as follows:

(a) Paragraph 7, inter alia, of the statement of claim is vague and does not give any particulars. In addition there was no evidence adduced on the part of the plaintiff to show in law and fact that the first defendant has breached the so called fiduciary duty or any duty recognised in law which the plaintiffs complain of, to provide the relief claimed for and that too on behalf of all the parties. The first defendant's role was in essence a salesman and nothing more, and all his action was closely monitored by the fourth plaintiff, directly and/or indirectly. It must not be forgotten that fiduciary duty relates to director's obligations to the company and not per se to other shareholders or directors (see *Percival v Wright* [1902] 2 Ch 421), even though it is now recognised in particular circumstances it may extend to director and/or shareholders. Failure to particularise the breach intelligibly will not attract any cause of action and/or remedy. In *Tai Kim San & Anor v Lim Cher Kia* [2001] 1 SLR 607, Amarjeet Singh JC on the related issue made the following observations:

> One of the difficulties postulated in *Percival v Wright* was as to what information should be released by directors to shareholders. The laintiffs' counsel in that case conceded that not all information known to directors should be made available also to shareholders. Counsel accepted on plaintiffs' behalf that directors were, as to information acquired in the ordinary course of management, 'tacitly released' from their duty of disclosure. Counsel for the plaintiffs went on to state:
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> > The defendants, for instance, would not have been bound to disclose a large casual profit, the discovery of a new vein, or the prospect of a good dividend.

In *The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in Relations of Confidence, Influence and Advantage* by GS Bower, (2nd Ed), 1990, by Sir Alexander Kingcome Turner) the learned author explained the decision in *Percival v Wright* (at para 18.53):

> In particular, the court did not hold that there might not be *particular circumstances*, going beyond those inherent in the ordinary relation of director and shareholder, in which the imposition of fiduciary duties of disclosure would be entirely appropriate. (Emphasis added.)

Since *Percival v Wright* there have therefore been a number of cases both in the United Kingdom and overseas which recognise that in particular or special circumstances some duties arise between directors and shareholders either requiring disclosure because a special relationship exists between the directors and the shareholders or because matters arise where shareholders have to necessarily rely on what directors say or do. In the latter type of case there is a guarded departure if any from the general principle set out in *Percival v Wright*.

Thus, in *Coleman v Myers* [1977] 2 NZLR 225 in a transaction between directors and shareholders, the Court of Appeal in New Zealand held that special circumstances arose in the case giving rise to a fiduciary duty arising between the parties necessitating material disclosure by the directors because of the family character of the company, the position of the directors in the family and the company, their high degree of insider knowledge and the manner in which the directors had gone about persuading shareholders to sell their shares.

In *Glavanics v Brunninghausen* (1996) 19 ACSR 204, an Australian case, the court held that fiduciary relationship between a director and a shareholder who was also a director, (but an inactive one) existed. The brief facts were that the relationship between the two directors G & B, having deteriorated, G, the inactive director, agreed to sell his one-sixth shareholding to B. However, prior to the agreement B had received an offer for the purchase of the company business of which he did not inform G. B having bought G's shares thereafter sold the company to the purchaser. The court was of the view that although there was no relationship of confidence and trust between G & B it nevertheless recognised several factors inherent in the case which gave rise to a fiduciary relationship between G and B,namely, a direct sale of shares by G to B; the fact of there being only the said two shareholders in the company which made it realistically impossible to distinguish between a fiduciary duty owed to a company and that owed to the shareholders and very importantly the evidence had gone on to show G's complete dependence on B for information and advice and the prior offer of purchase of the business of the company by another in the circumstances was regarded as material factor which B ought to have disclosed to G as the information was sensitive to the pricing of the shares that G sold to B. On appeal the Court of Appeal of New South Wales affirmed the decision: *Brunninghausen v Glavanics* (1999) 32 ACSR 294. In so upholding the decision, the appellate court opined that whilst the general principle that a director's fiduciary duties are owed to the company and not to the shareholders is correct, the nature of the transaction may give rise to a fiduciary duty owed by the directors to the shareholders. *Ford's Principles of Corporate Law* sums up pithly the circumstances in which there is a fiduciary obligation to disclosure:

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In summary, pointers towards the existence of a fiduciary obligation include shareholders' dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and the extent of any positive action taken by, or on behalf of the directors to promote the transaction and the structure of shareholdings in the company: *Coleman v Myers, Chan v Zacharia* (1984) 154 CLR 178 at p 198; 53 ALR 417 per Deane J; *Glavanics v Brunninghausen*. Even if there is no relationship of trust and confidence, as was the case in *Brunninghausen*, a fiduciary relationship can still exist between a director and shareholder where the director occupies a position of particular advantage in relation to the shareholder and special circumstances, such as confidential negotiations to sell the company's business, allow the director to use that advantage to the detriment of the shareholder: *Brunninghausen v Glanavics*.

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(b) The complaint about securing banking facilities or guarantees does not lead to any breach of fiduciary duties warranting the court to grant any relief as prayed, and I also find there was no sufficient evidence to support a personal claim against the first defendant.

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(c) The complaint against the second defendant on the facts of the instant case is not maintainable and the prayers are obscure to find liability as well as relief.

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(d) It is my finding that the first defendant's claim for remuneration must be allowed as there was sufficient evidence to show that he is entitled to claim the said sum and the sum as agreed has not been paid notwithstanding he was a salesman of the first plaintiff. In addition the entire witness statements of the plaintiffs in particular the fourth plaintiff did not challenge the first defendant's claim for remuneration. This in my view will be fatal in evidential terms and such omission may stand as an admission in favour of the first defendant (see s 114 of the EA 1950).

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(e) It is my finding that on the facts and evidence the plaintiffs have trumpeted a misconceived cause of action and relief against the first defendant, and the second defendant, and as I said earlier the issue on costs must reflect the real litigants in this dispute.

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[20] For reasons stated above and after hearing the arguments on costs I make the following orders:

(a) the plaintiffs' action be dismissed with costs;

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(b) the fourth plaintiff to pay the costs of RM120,000 to the first defendant;

(c) the first plaintiff to pay the first defendant's counterclaimed sum of RM192,000 with interest at 8%pa form the date of filing of the counterclaim until judgment and thereafter at the rate of 8%pa until full

realisation, subject to withholding payment in respect of income tax dues of the first defendant (if any) which shall not exceed more than 30% of the principal sum, ie RM192,000;

(d) the first plaintiff to pay costs in the sum of RM30,000 for the counterclaim to the first defendant; and

(e) the first defendant to pay allocatur fees. The order for costs may be extracted upon the payment of allocatur fees. The deputy registrar to issue the certificate for the allocatur.

I hereby order so.

Plaintiffs' claim dismissed with costs and first defendant's counterclaim allowed.

Reported by Ashgar Ali Ali Mohamed